

1 (Doc. 33, 38) By the time Plaintiff's counsel was authorized to appear telephonically and
2 practice law *pro hac vice* in this District Court, the case management conference had been
3 rescheduled from June 28, 2013, to July 10, 2013, and then to September 3, 2013. (Docs. 26,
4 29, 35) The Rule 16 case management or scheduling order was finally issued the following
5 day, September 4, 2013, nearly nine months after this action was filed. (Doc. 40) The
6 scheduling order establishes firm deadlines for, *inter alia*, amending pleadings, November
7 1, 2013; completing all discovery, June 30, 2014; and filing dispositive motions, July 18,
8 2014. (*Id.*)

9 Defendants' Motion to Dismiss for Failure to Prosecute, doc. 49 at 1-2, outlines, and
10 the docket confirms, Plaintiff has engaged in considerable delay in prolonging this lawsuit
11 and failing to timely comply with court orders. Significantly, Defendants scheduled
12 Plaintiff's deposition on three different dates, but Plaintiff managed to avoid being deposed
13 on each date. (Docs. 43, 44 and 47) Defendants assert that when they attempted to confirm
14 the first deposition date, December 10, 2013, Plaintiff's counsel indicated he was planning
15 to file a motion to withdraw and asked that the deposition be rescheduled and defense
16 counsel agreed.¹ (Doc. 49 at 2) The deposition was rescheduled to January 22, 2014. (Doc.
17 44) When Defendants contacted Plaintiff's counsel on January 21, 2014 to confirm the
18 deposition was going as noticed, Plaintiff's counsel unilaterally cancelled the deposition
19 because Plaintiff's car was allegedly in disrepair. (Doc. 49 at 2) Plaintiff's counsel indicated,
20 however, that Plaintiff was available for her deposition "[a]nytime after February 1 - she
21 expects to have her car repaired by then so she can drive to Phoenix and be deposed." (*Id.*,
22 Exhibit "Exh." 2 at 18) The deposition was then rescheduled to March 3, 2014. (Doc. 47)
23 Plaintiff, however, failed to appear for the deposition and has provided no reason for not
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25 ¹ Despite informing Defendants' counsel in an e-mail on December 10, 2013 that he
26 intended to withdraw from Plaintiff's case, Plaintiff's counsel has not done so as of this date.
27 Although he remains counsel of record for Plaintiff, he failed to file a response to
28 Defendants' Motion for Judgment on the Pleadings, doc. 45, despite being ordered to do so,
doc. 46, and, as noted above, failed to respond to the instant Motion to Dismiss for Failure
to Prosecute, doc. 49.

1 appearing. (Doc. 49, Exh. 3, Court Reporter's Affidavit of Non-Appearance) Plaintiff's
2 deposition was noticed to begin at 9:00 a.m. on March 3, 2014, at defense counsel's Phoenix
3 office. (Doc. 47) On that day, defense counsel and the court reported waited "until
4 approximately 9:30 a.m., by which time [Plaintiff] had not appeared for the purpose of
5 having a deposition taken." (Doc. 49, Exh. 3 at 22) On March 12, 2014, Defendants filed the
6 instant motion. (Doc. 47)

7 **II. Discussion**

8 Defendants argue Plaintiff's case should be dismissed because Plaintiff "has
9 repeatedly ignored the rules and various court orders and has made virtually no effort to
10 prosecute her case — from failing to amend a deficient complaint, to failing to respond to a
11 dispositive motion, to failing to appear for a deposition that was twice rescheduled to
12 accommodate her." (Doc. 49 at 3) Except for her initial Rule 26(a) disclosures made under
13 threat of sanctions imposed, doc. 41, the docket does not reflect Plaintiff has initiated any
14 formal discovery.

15 Plaintiff has the general duty to prosecute her case. *See Fidelity Philadelphia Trust*
16 *Co. v. Pioche Mines Consolidated, Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). Rule 41(b) of the
17 Federal Rules of Civil Procedure provides that "[i]f the plaintiff fails to prosecute or to
18 comply with these rules or a court order, a defendant may move to dismiss the action or any
19 claim against it." *See also, Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30 (1962)
20 (district court's authority to dismiss an action for lack of prosecution is necessary to prevent
21 undue delays in the disposition of cases and avoid congestion in district court calendars);
22 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (district court may dismiss action
23 for failure to comply with any order of the court).

24 Neither Plaintiff nor her lawyer has offered an explanation for her failure to respond
25 to either of Defendants' dispositive motions and each has completely disregarded the Court's
26 January 16, 2014 and March 21, 2014 warnings that the failure to timely respond to
27 Defendants' motion may be "deemed Plaintiff's consent to the granting of that motion
28 without further notice, and judgment may be entered dismissing the complaint and this

lawsuit against . . . Defendants with prejudice pursuant to LRCiv 7.2(i).” (citation omitted) (Docs. 46 at 2; 50 at 2) The warning plainly stated, “This means the case is over.” (Doc. 46 at 2) This warning, twice given, satisfies the Court’s obligation to consider less drastic alternatives to dismissal. *See Malone v. United States Postal Service*, 83 F.2d 128, 131 (9th Cir. 1987). Additionally, Plaintiff bears the burden of persuasion as to the reasonableness of her delay and lack of prejudice to Defendants. *See Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984). Under the circumstances of this case, the delay is unreasonable and creates a presumption of prejudice to Defendants. *See Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

In determining whether a plaintiff’s failure to prosecute warrants dismissal of the case, a district court must weigh the following five factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (quoting *Henderson*, 779 F.2d at 1423). “The first two of these factors favor the imposition of sanctions in most cases, while the fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice and availability of lesser sanctions.” *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).

Here, the first, second, and third factors favor dismissal of this case. The case is now nearly a year-and-a-half old and, except for the initial disclosures exchanged under threat of sanctions by the Court, Plaintiff has filed nothing for nearly eight months and, according to the docket, has not initiated any written discovery or noticed any depositions. (See doc. 41, ¶ 1 at 6, Notice of Service of Plaintiff’s Initial Disclosure Statement, filed on September 6, 2013) Despite two recent dispositive motions filed by Defendants, and orders from the Court to respond to those motions, Plaintiff has not responded to either one.² Plaintiff failed to

² Because Defendants’ initial Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), doc. 45, filed on January 14, 2014, did not contain a certificate of conferral and was not promptly filed until after the amendment deadline had

1 appear for her deposition, even after it was rescheduled for her benefit due to apparent
 2 transportation issues. Plaintiff's actions are preventing the case from proceeding in the
 3 foreseeable future. Defendants have undoubtedly incurred substantial fees and costs in
 4 defending this action, but the case is more developed today than it was at the September 3,
 5 2013 case management conference. Moreover, the risk of prejudice to Defendants has
 6 increased as time has passed while Plaintiff continues to ignore her obligation to prosecute
 7 the case with impunity. The fourth factor, as always, weighs against dismissal.

8 "The authority of a federal trial court to dismiss a plaintiff's action with prejudice
 9 because of h[er] failure to prosecute cannot seriously be doubted." *Link*, 370 U.S. at 629.
 10 "The power to invoke this sanction is necessary in order to prevent undue delays in the
 11 disposition of pending cases and to avoid congestion in the calendars of the District Courts."
 12 *Id.* at 629-630; *see also Al-Torki v. Kaempfen*, 78 F.3d 1381, 1385 (9th Cir. 1996) (dismissal
 13 with prejudice for willful and inexcusable failure to prosecute is a proper exercise of
 14 discretion under Fed.R.Civ.P. 41(b) and the inherent power of the court) (citations omitted).

15 The fourth factor - public policy favoring disposition of cases on the merits - normally
 16 weighs against dismissal and the fifth factor requires a district court to consider whether less
 17 drastic alternatives are available and appropriate. The Ninth Circuit recognizes that warning
 18 a party that her failure to obey the court's order will result in the dismissal can satisfy the
 19 consideration of alternatives requirement. *e.g.*, *Ferdik*, 963 F.2d at 1262 (recognizing that a
 20 warning can satisfy the "consideration of alternatives" requirement); *Malone*, 833 F.2d at 132
 21 & n. 1 (noting that a warning is an alternative sanction, and that case law suggests that
 22 warning a plaintiff that failure to obey a court order will result in dismissal can suffice).

23 Here, the Court has repeatedly warned Plaintiff that failure to respond to dispositive
 24 motions could result in judgment being entered and dismissal of the complaint. Plaintiff has
 25 disregarded each of the Court's orders in that regard. Accordingly, the Court finds it
 26 unnecessary to continue issuing warnings which Plaintiff disregards. Given the lengthy and

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 28 passed, the Court denied the motion without prejudice in favor of a timely summary
 judgment motion pursuant to Rule 56, Fed.R.Civ.P. (Doc. 48)

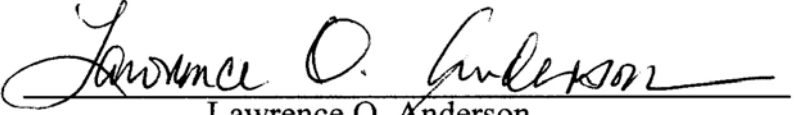
1 dilatory conduct of Plaintiff in this litigation, the first three factors clearly favor dismissal
2 with prejudice. The fourth factor, as always, weighs against dismissal. The Court has
3 considered less drastic alternatives, but Plaintiff already have had two different opportunities
4 to respond to dispositive motions and has not done so. Plaintiff's repeated failure to do so
5 convinces the Court that the only possible less drastic alternative - dismissal with leave to
6 amend - is not warranted.

7 Thus, after considering and weighing the above factors to the circumstances of this
8 case, the Court finds that this action should be dismissed with prejudice pursuant to Rule
9 41(b) of the Federal Rules of Civil Procedure.

10 Accordingly,

11 **IT IS ORDERED** that Defendants' Motion to Dismiss for Failure to Prosecute, doc.
12 49, is **GRANTED**. This action is hereby **DISMISSED** with prejudice. The Clerk of Court
13 is kindly directed to enter judgment in favor of Defendants and against Plaintiff.

14 Dated this 28th day of April, 2014.

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17 Lawrence O. Anderson
18 United States Magistrate Judge
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